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In the
Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 232

WILLIAM OSCAR MATTOX, JR.,
Petitioner,

vs.

DALE CARSON, as Sheriff of
Duval County, Florida,
Respondent.

CECIL FREDERICK LOWE,
Petitioner,

vs.

DALE CARSON, as Sheriff of
Duval County, Florida,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, William Oscar Mattox, Jr., and Cecil Frederick Lowe, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered in Appeals No. 27376 and 27386, respectively, on March 25, 1970.*

* Case No. 27376 and Case No. 27386 are consolidated for the purposes of this Petition for Writ of Certiorari pursuant to Rule 23 (5), Supreme Court Rules, in that they involve identical or closely related questions.

Citations to Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit, as of this date unreported, is attached hereto as Appendix A. The opinion of the Court of Appeals for the Fifth Circuit denying the Petition for Rehearing and Petition for Rehearing en Banc, as yet unreported, is attached hereto as Appendix B. The opinion delivered by the United States District Court, for the Middle District of Florida, in granting the petitioners' Writs of Habeas Corpus is recorded in 295 F. Supp. 1054 (Fla. M.D., 1969), and is attached hereto as Appendix C. The opinions of the Supreme Court of Florida, reported in 210 So. 2d 197 and 210 So. 2d 199, are attached hereto as Appendix D and E, respectively. The opinions of the District Court of Appeal of Florida, 1st District, reported in 202 So. 2d 232 and 202 So. 2d 206, are attached hereto as Appendix F and G, respectively.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 25, 1970, (App. A). Rehearing was denied on May 6, 1970, (App. B). This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented

1. Whether compelling petitioners to appear and testify before the Grand Jury by witness subpoena after they became suspects and potential defendants to the larcenies then being investigated by the Grand Jury, was the equivalent of "in-custody" interrogation, rendering a waiver of their rights and privileges conferred by the Fifth Amendment to the Constitution of the United States and Section 932.29, Florida Statutes, in the absence of warnings of their constitutional privileges and full procedural safeguards, void.

2. Whether the scope of *Miranda v. State of Arizona*, is the broad protection of the privilege against self-incrimination including any substitute therefore enacted by Congress and the States in the form of immunity statutes, or, as the Court of Appeals held, is restricted in application to the narrow exclusion of statements obtained from an individual in violation of his constitutional privilege.

Constitutional Provisions and State Statutes Involved

This case involves the Fifth and Fourteenth Amendments to the United States Constitution which provide in part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law, . . ."
>
> U.S. Const., Amend. V

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."
>
> U.S. Const., Amend. XIV, Section 1

The laws of Florida applicable to this case are as follows:

> "No person shall be excused from attending and testifying, or producing any book, paper or other document before any court upon any investigation, proceeding or trial, for a violation of any of the statutes of this state against bribery, burglary, larceny, gaming or gambling, or of any of the statutes against the illegal sale of spirituous, vinous or malt liquors, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture, but no person shall

be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding."

Section 932.29, Florida Statutes, 1965. (Vol. 2, p. 3717)

"Witnesses summoned before a grand jury or in a criminal case pending in court, shall remain in attendance, and shall not depart therefrom unless they are discharged by order of the Court and if they depart without leave they shall be considered in contempt and liable to be attached for the same as in other cases of contempt. All witnesses subpoenaed once in a case shall attend at each succeeding term of court until the case is disposed of."

Section 932.28, Florida Statutes, 1965. (Vol. 2, p. 3717)

Statement of the Case

On July 22, 1966, petitioner, Cecil Frederick Lowe and one George C. Robinson, Sr., were jointly charged in a one-count indictment by the Duval County, Florida, Grand Jury with the offense of Grand Larceny. (L.R. 15-17)* On the

* In this Petition, Petitioners, William Oscar Mattox, Jr., and Cecil Frederick Lowe, will be referred to individually as "Petitioner Mattox" and "Petitioner Lowe" and collectively as "Petitioners". Reference to the record in the Mattox case, filed with the Court of Appeals, and designated as Volume I; Document 1 of the record prepared for purposes of this Petition, will be designated as "M.R." while the record in the Lowe case, filed with the Court of Appeals, and designated as Volume II, Document 2 of the record prepared for purposes of this Petition, will be designated as "L.R.". Reference to the Petition for Habeas Corpus filed in the United States District Court on behalf of Mattox, and contained in Volume III, Document 3 of the record prepared for purposes of this Petition, will be designated as "M.P", while the Petition for Habeas Corpus filed in the United States District Court on behalf of Lowe, and contained in Volume III, Document 4 of the record prepared for purposes of this Petition, will be designated as "L.P." Reference to the Appendix to this Petition will be designated as "App.".

same date, petitioner, William Oscar Mattox, and George G. Robinson, Sr., were jointly charged in a one-count indictment by the same Grand Jury with the offense of Grand Larceny. (M.R. 15-18). On August 10, 1966, the State Attorney filed informations based upon the respective indictments charging petitioners, respectively, with the offense of Grand Larceny, which are the same grand larcenies and the same offenses of Grand Larceny, described in the indictments. (L.R. 1-4; M.R. 1-4). The informations based on the indictments charged in substance that both petitioners, as members of the City Council of the City of Jacksonville, and their co-defendant, George G. Robinson, Sr., stole certain sums of money from the City of Jacksonville, (L.R. 1-4; M.R. 1-4)**

On July 13, 1966 before said indictments were returned, and for an appreciable period of time prior thereto, the same Grand Jury that indicted petitioners had been conducting an investigation and inquiry into larcenies of monies and other personal items of value from the City of Jacksonville. The investigations were in connection with the fraudulent acquisition of personal items of merchandise from the Harry Finkelstein Company of Jacksonville, Florida. The merchandise acquired was for the personal use of certain individuals and was paid for through the City Recreation Department of the City of Jacksonville, by the City of Jacksonville. (L.R. 7-8; M.R. 7-8). Prior to July 13, 1966, the Grand Jury had heard many witnesses' testimony and had adduced before it many documents in reference to said larcenies. (L.R. 7-8; M.R. 7-8). At that time petitioners were definite suspects and potential defendants of said larcenies and were so considered by the Grand Jury. The focus of guilt of said grand larcenies was definitely

** Petitioner Lowe, allegedly stole $850.00 in that he had acquired a Zenith color television set from Harry Finkelstein Company on December 22, 1962, for his personal use, which was paid for by the City of Jacksonville through the Recreation Department of the said City of Jacksonville. (L.R. 1, 31-33). Petitioner Mattox allegedly stole $495.00 in that he had acquired a Zenith stereo set from Harry Finkelstein Company on December 18, 1962, for his personal use, which was paid for by the City of Jacksonville through the Recreation Department of the City of Jacksonville. (M.R. 1, 32-34).

upon petitioners. (L.R. 19-21; M.R. 20-21). These allegations were admitted by the State in its demurrer to the petitioners' motions to quash the informations (L.R. 21-24; M.R. 22-25).

On July 13, 1966, the Grand Jury, notwithstanding the fact that it then considered petitioners definite suspects and potential defendants of the aforementioned offenses of Grand Larceny, later charged in said indictments and informations, issued witness subpoenas requiring petitioners to appear and testify before the Grand Jury. (L.R. 18; M.R. 19). These witness subpoenas were issued and served on petitioners pursuant to Section 932.28, Florida Statutes, (L.R. 18; M.R. 19).

Under subpoena the petitioners appeared separately before the Grand Jury on July 14, 1966. While petitioners were before the Grand Jury in response to the subpoenas, and immediately prior to each testifying before the Grand Jury, the State Attorney presented each Petitioner with and requested that he sign, a purported written waiver of immunity. The waiver was directed to the immunity to which the petitioner would be entitled under Section 932.29, Florida Statutes, in lieu of his privilege to remain silent under the Fifth Amendment to the Constitution of the United States of America. (L.R. 34-40; M.R. 35-41).

Each petitioner at said time and place before the Grand Jury, was not a lawyer, did not have with him a lawyer and had not consulted a lawyer before or during the appearance before the Grand Jury. (L.R. 12; M.R. 12). At no time before the waiver of immunity was handed to each Petitioner with the request to sign it, or at any other time, was either petitioner advised of the following: (1) that he was a definite suspect and potential defendant to the charges of Grand Larceny then being investigated by the Grand Jury; (2) that he had the right to consult with a lawyer in reference to his rights and privileges under Section 932.29, Florida Statutes, and the Fifth Amendment to the United States Constitution or the waiver of any such rights and privileges or in reference to his testimony before the Grand Jury and to have the lawyer with him during

the interrogation before the Grand Jury; (3) that if he did not have the financial ability to pay for an attorney for advice and to represent him before and during the interrogation, an attorney would be appointed to him; (4) that he had the right to remain silent under the Fifth Amendment to the Constitution of the United States unless the immunities and privileges under Section 932.29 were afforded to him; (5) that if he waived the immunities to which he was entitled under Section 932.29, Florida Statutes, that anything he said could be used against him either then for the purpose of returning an indictment, or at a subsequent proceeding or trial; or (6) that he had the right to exercise any of these rights and privileges at any time during the interrogation. (L.R. 11-12; M.R. 11-12).

In the absence of these warnings and in the absence of an explanation of petitioners rights and privileges under the Constitution of the United States, each petitioner signed the purported waivers of immunity before the Grand Jury. (L.R. 34-35; M.R. 35-36).

Neither before nor after the execution of the purported waiver of immunity, and before interrogation, was either petitioner excused from the witness subpoena and told he could leave the Grand Jury room. (L.R. 36-74; M.R. 37-67) Nor, was either petitioner advised by anyone that if he refused to sign the waiver of immunity he would be free to leave the Grand Jury room. (L.R. 36-74; M.R. 37-67). Upon administration of an oath, the State Attorney, Assistant State Attorneys and various members of the Grand Jury interrogated each petitioner at length in reference to the larcenies from the City of Jacksonville. Each petitioner, in response to the interrogation, testified at length and in detail before the Grand Jury, in reference to and concerning the particular Grand Larceny subsequently charged against him in said information and indictment, which testimony disclosed information relevant, material, substantial and pertinent to said Grand Larceny.

After the filing of the informations, petitioners, prior to entering a plea to each information, filed a motion to quash

the information, containing among other grounds, the ground in the nature of a plea in abatement, alleging the facts hereinabove alleged, and praying that the Court enter an order quashing each information and abating said prosecution because, and on the grounds that, in the absence of the warnings of their Federal Constitutional rights, above mentioned, the alleged waivers of immunity executed by the petitioners before the Grand Jury were void, consequently, the petitioners had immunity under Section 932.29, Florida Statutes and for the State of Florida to not dismiss the informations but to continue to prosecute petitioners was in violation of their rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. (L.R. 5-14, 19-20; M.R. 5-14, 20-21). The State of Florida did not traverse or deny the allegations of the petitioners' motions to quash, but filed a demurrer to each motion to quash, which in law, admitted as true all of the allegations contained therein. (L.R. 21-24; M.R. 22-25). The Criminal Court of Record entered an order holding the waivers of immunity executed by petitioners valid, sustained the State's demurrer and denied the motions of petitioners to quash the informations. (L.R. 25-26; M.R. 26-27).

Subsequently, the petitioners filed their respective Suggestions for Prohibition in the Florida District Court of Appeal, 1st District, requesting that a rule nisi issue against the respective Judges of the Criminal Court of Duval County, Florida, from exercising further jurisdiction over the petitioners on the ground that as the purported waivers of immunity, signed under the circumstances described, without the proper Federal Constitutional warnings and safeguards, were nullities, the petitioners were immunized under Section 932.29, Florida Statutes, and were not subject to prosecution, penalty or forfeiture on the charges of Grand Larceny contained in the informations, and for the State of Florida to continue to prosecute them would be in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. (App. F, p. 1).

The District Court of Appeal, in a two-to-one decision, denied each petitioner's Suggestion for Prohibition, holding:

". . . Miranda is applicable to interrogations in the 'isolated setting of the police station' and not those occurring 'in Courts or other official investigations' where there are impartial observers to guard against intimidation and trickery being employed to compel the witness to give evidence against himself."

State ex. rel. Lowe v. Nelson
(Fla. App. 1967) 202 So. 2d 232, 234
(App. F. p. 5)

State ex. rel. Mattox v. Layton
(Fla. App. 1967) 202 So. 2d 206
(App. G.)

The Supreme Court of Florida granted certiorari in each case to the Florida District Court of Appeal, 1st District. The Supreme Court in a per curiam opinion adopted and affirmed the decision of the District Court of Appeal in each case, with two Justices dissenting. See *State ex. rel. Lowe v. Nelson*, 210 So. 2d 197 (Fla. 1968) (App. D), and *State ex. rel. Mattox v. Layton*, 210 So. 2d 199 (Fla. 1968) (App. E).

On September 9, 1968, the petitioners filed their respective petitions for writs of habeas corpus in the United States District Court, Middle District of Florida (L.P.; M.P.). The petitioners alleged in these petitions that they were then held in the custody of the respondent Sheriff under the informations filed as aforesaid, which incarceration was in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America in that the failure to give them the warnings of their constitutional rights and privileges under the Fifth Amendment and the substitute therefor, the Florida immunity statute, when they were before the Grand Jury rendered their waivers of immunity void, resulting in their immunization, and for the State of Florida to continue to prosecute them was contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States (L.P.; M.P.).

The United States District Court in granting the writs reasoned that as Florida Statute 932.29 stood in the stead of

the Fifth Amendment, the *Miranda* warnings were necessary to constitute a valid waiver of immunity, and in the absence of the warnings the waivers of immunity are void and petitioners were immunized from prosecution on the charges of Grand Larceny. (App. C).

Respondent appealed to the United States Court of Appeals For The Fifth Circuit. The Court reversed the decision of the District Court holding that *Miranda v. State of Arizona*, 384 U.S. 436 (1966), did not authorize a complete dismissal of the criminal charges by reinstating the immunity rights of the petitioners, but only prohibited the use of the compelled testimony or its fruits in connection with a criminal prosecution (App. A.). Petition for rehearing was denied (App. B.)

Reason for Granting the Writ

I.

The Writ should be granted because the decision of the Fifth Circuit Court of Appeals (App. A.), that failure to give the warnings required in *Miranda v. State of Arizona*, 384 U.S. 436 (1966), does not authorize a dismissal of criminal charges in light of Florida's immunity statute, but only prohibits the use of the compelled testimony or its fruits in connection with a criminal prosecution, decides a question of Federal Constitutional law in a way which conflicts with *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), and *Regan v. People of New York*, 349 U.S. 58 (1955).

The United States District Court held that *Miranda* warnings were required to effectuate a valid waiver of the Florida immunity statute, a substitute for the Fifth Amendment and, absent a valid waiver and in light of the immunity statute, the petitioners were immunized from prosecution. The Court of Appeals reversed saying, "*Miranda* does not authorize a

complete dismissal of the criminal charges by reinstating the immunity rights of the petitioners. (App. A). Instead, the Court of Appeals continued, the immunity is from the "use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying." (App. A). The effect of the decision of the Court of Appeals is that *Miranda* warnings are not applicable to the waiver of substituting and supplanting provisions for the privilege against self-incrimination such as immunity statutes, because immunity statutes provide a different relief than accorded by the Fifth Amendment.

Restricting *Miranda* in this fashion is contrary to the express terms of the applicable immunity statute and is in direct conflict with a long line of decisions of this Court.

This Court has repeatedly held that an immunity statute is a substitute for, and supplants, the Fifth Amendment to the Constitution of the United States. It must, therefore, be as broad in scope as the constitutional guarantee against self-incrimination for which it is substituted or supplanted, and must be liberally construed. *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *Brown v. Walker*, 161 U.S. 591 (1896); *Brown v. United States*, 359 U.S. 41 (1959); *United States v. Monia*, 317 U.S. 424 (1943); *Smith v. United States*, 337 U.S. 137 (1949) and *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965).

The constitutional guarantee against self-incrimination cannot be substituted, supplanted or abridged by legislation unless the legislation (immunity statute) is a full substitute for the guarantee, and to constitute a "full substitute" it "*must afford absolute immunity against future prosecution* for the offense to which the question relates," *Counselman v. Hitchcock*, 142 U.S. 547, 585 (1892) (emphasis added). [See also, *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), wherein this Court held that to provide less than "absolute immunity" would render *Counselman* illusory.]

The reasoning of this Court has been that a witness does not need an immunity statute to protect him from the use of incriminating testimony he is compelled to give over his objection. The Fifth Amendment protects against this without an immunity statute. *Murphy v. Waterfront Commission of New York*, 378 U.S. 52 (1964); See also, *Adams v. Maryland*, 347 U.S. 179 (1954).

Prior to the decisions in *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Murphy v. Waterfront Commission of New York*, 378 U.S. 52 (1964), it was generally held that the Fifth Amendment to the Constitution of the United States was not applicable to its full extent to the states. In *Malloy v. Hogan*, 378 U.S. 1, (1964), however, the Court departed from the views formerly expressed in *Twining v. New Jersey*, 211 U.S. 78 (1908), and *Adamson v. California*, 332 U.S. 46 (1947), and expressly held that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the states.

As the Fifth Amendment to the United States' Constitution has been extended, through the Fourteenth Amendment, to the states, (*Malloy v. Hogan*, 378 U.S. 1 [1964]), the Florida immunity statute to be constitutional, must also be a complete substitute and coextensive with the Fifth Amendment to the Constitution of the United States. As Section 932.29, Florida Statutes, gives complete protection to a witness from prosecution or any penalty or forfeiture for or on account of any transaction or matter concerning which he testified, it is valid under the teachings of *Counselman v. Hitchcock*, 142 U.S. 547 (1892) and *Brown v. Walker*, 161 U.S. 591 (1896). It naturally follows that any alleged waiver of the immunity conferred by the statute must be tested by federal constitutional standards the same as a federal immunity statute or a waiver of the Fifth Amendment itself.

In *Smith v. United States*, 337 U.S. 137 (1949), the Court applied the same standards to the alleged waiver of a supplanting immunity statute as are applied to a waiver of the privilege

under the Fifth Amendment. See also: *Stevens v. Marks*, 383 U.S. 234 (1966) holding that the withdrawal of a waiver of the New York immunity Statute was "a matter of federal constitutional law." *Raley v. State of Ohio*, 360 U.S. 423 (1959) holding that a "State may not substitute for the privilege against self-incrimination an intricate scheme for conferring immunity and thereafter hold in contempt those who fail fully to perceive its subtlties."; *Gardner v. Broderick*, 392 U.S. 273 (1968) and *Uniform Sanitation Men's Association, Inc. v. Commission of Sanitation of the City of New York*, 392 U.S. 280 (1968) holding that the waiver of the benefits of a state immunity statute must be tested by the same standards as the waiver of the constitutional privilege which the statute supplants.

The Florida immunity statute is definitely involved with the Fifth Amendment privilege against self-incrimination. It is a substitute for and supplants the constitutional amendment. As a consequence thereof, any waiver of the benefits conferred by the statute must be tested by the same constitutional principles enunciated in *Johnson v. Zerbst*, 304 U.S. 458 (1938) and *Miranda v. State of Arizona*, 384 U.S. 346 (1966).

The immunity conferred by statutes as Section 932.29, Florida Statutes, is not dependent upon the nature of the proceeding in which the party claiming the immunity is compelled to testify or produce evidence. It has long been recognized that producing evidence or giving testimony before a Grand Jury in reference to one of the crimes named in the statute immunizes under the statute. *Counselman v. Hitchcock*, 142 U.S. 547 (1892) (Fifth Amendment held applicable to witness before Grand Jury); *Malloy v. Hogan*, 378 U.S. 1 (1964). (irrelevant that individual was a witness in statutory inquiry as opposed to defendant in criminal prosecution). *State ex. rel. Byer v. Willard*, (Fla. 1951) 54 So. 2d 179 (Florida immunity statute held applicable to a witness before the Grand Jury).

The test of whether testimony given by a witness is sufficiently incriminating to invoke the terms of an immunity statute is not dependent upon whether admissions by them-

selves would support a conviction under a criminal statute. The test is whether any testimony so given in such inquiry constitutes a link in the chain of evidence needed to prosecute such witness thereafter charged for such offense revealed by the testimony he was required to give, whether such testimony is used or not. *Smith v. United States*, 337 U.S. 137 (1949); *Blau v. United States*, 340 U.S. 159 (1950); *Hoffman v. United States*, 341 U.S. 479 (1951); *Estes v. Potter*, 183 F. 2d 865 (5th Cir. 1950). In *State ex. rel. Mitchell v. Kelly*, (Fla. 1954) 71 So. 2d 887, it was held that it is immaterial "whether such testimony is used or not". This is because "where a person has been compelled to give evidence under such circumstances" it is "the fact of the giving it" which immunizes him under Section 932.29, Florida Statutes. *State ex. rel. Byer v. Willard* (Fla. 1951), 54 So. 2d 179, 182.

Each Petitioner was questioned closely before the Grand Jury in reference to the particular Zenith color televison set and the Stereo set which were two of the larcenies being investigated. Further, the petitioners, in response to interrogation, gave answers which definitely incriminated them.

Petitioner Lowe admitted, among other things, (1) that he had obtained the subject Zenith color television from Harry Finkelstein Company (L.R. 41-42); (2) that he was present at Harry Finkelstein Company when the arrangements were being made for him to acquire the television set (L.R. 64); (3) that he had acquired the television set by arrangement with Mr. Robinson, his co-defendant (L.R. 42-43, 64); (4) that he had never paid for the television set (L.R. 46), and (5) that he still had it in his possession (L.R. 46). The testimony of Petitioner Mattox was of the same import, and equally as incriminating. (M.R. 41-52).

The answers given by the Petitioners in this setting before the Grand Jury not only tended to incriminate them, but did incriminate them and furnished links in the chain of evidence needed to prosecute them for the larcenies then being investigated by the Grand Jury and for which they were subsequently indicted and informed against.

At the time they appeared before the Grand Jury, the petitioners were definite suspects and potential defendants to the charges of Grand Larceny under investigation by the Grand Jury. They were the target of the Grand Jury investigation. The State of Florida from the inception of these cases has never contended otherwise. It admitted the status of the petitioners before the Grand Jury by its demurrer to the petitioners' motions to quash in the Criminal Court of Record. (L.R. 21-24; M.R. 22-25).

As a consequence of their status as suspects or potential defendants under subpoena to appear before the Grand Jury, the principles and safeguards of *Escobedo v. State of Illinois*, 378 U.S. 478 (1964), as expanded by *Miranda v. State of Arizona*, 384 U.S. 467 (1966), were applicable to them. The investigation by the Grand Jury into the grand larcenies was no longer a general inquiry into an unsolved crime, but had begun to focus on the petitioners, *Escobedo v. State of Illinois* 378 U.S. 478 (1964).

Petitioners' appearance before the Grand Jury under the circumstance was the equivalent of "in-custody" as defined by *Miranda v. State of Arizona* 384 U.S. 436 (1966).

> "By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."
>
> 384 U.S. at 444.

The State of Florida initiated the proceeding by issuing the witness subpoena and framed the setting for the compulsive questioning by requiring the petitioner to be present in the isolated chambers of the Grand Jury, separated from relatives and friends. The petitioners were effectively held in the chambers of the Grand Jury by the subpoenas issued and served on them under Section 932.29, Florida Statutes. They could not "depart without leave" and if they did, Section 932.28, Florida Statutes provided," . . ! they shall be considered in contempt and liable to be attached for the same as in other cases of

contempt." The petitioners before the Grand Jury were neither technically nor in reality free to terminate the questioning nor were they free to walk out the door. Each was "deprived of his freedom of action in a significant way."

To testify in a legal proceeding under, and by virtue of, a witness subpoena, is legal compulsion. See *State ex. rel. Reynolds v. Newell* (Fla. 1958) 102 So. 2d 613. Incriminating statements made during the Grand Jury questioning, no less than such statements made during police interrogation, and no less than statements made at a preliminary hearing may be used against the defendant at trial. *White v. Maryland*, 373 U.S. 59 (1963).

Many decisions since *Miranda* have held that a witness suspect and potential defendant, required to appear before the Grand Jury by a witness subpoena, is "in-custody" and the warnings and safeguards required by *Miranda* are applicable to him. In *State of Utah v. Ruggeri*, (Utah 1967) 429 P. 2d 969, the Court in describing the status of a potential defendant subpoenaed before the Grand Jury said:

> "When Brady entered the Grand Jury Room pursuant to a subpoena, he was in custody. He could not leave until he was excused."
>
> 429 P. 2d at 973

To the same effect are: *State v. Sarcone* (N.J. 1967) 233 A 2d 406; *State v. Rosania* (N.J. 1967) 233 A. 2d 413; *Chandler v. Garrison* (E.D. La., 1968) 286 F. Supp. 191; *Sheridan v. Garrison* (E.D. La. 1967) 273 F. Supp. 673 and *United States v. Fruchtman* (N.D. Ohio, 1968) 282 F. Supp 534. See Meshbesher, *Right to Counsel Before Grand Jury*, 41 F.R.D. 189 (1966).

An immunity statute, State or Federal, being a substitute for and supplanting the Fifth Amendment against self-incrimination, *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965); *Brown v. Walker*, 161 U.S. 591 (1896), a waiver of its

benefits is in fact the same as a waiver of the self-incrimination clause to the United States Constitution. *Smith v. United States*, 337 U.S. 137 (1949); *Gardner v. Broderick*, 392 U.S. 273 (1968), and *Uniform Sanitation Men's Association, Inc. v. Commissioner of Sanitation of the City of New York*, 392 U.S. 280 (1968). And such waiver is tested and controlled by Federal law. *Brookhart v. Janis*, 384 U.S. 1 (1966); *Stevens v. Marks*, 383 U.S. 234 (1966); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

The petitioners were not given the warnings and safeguards required by *Miranda* before executing the waivers of immunity before the Grand Jury, consequently the waivers were void. *Smith v. United States*, 337 U.S. 137 (1949).

The waivers of the immunity statute being void, the petitioners were immunized by giving their testimony before the Grand Jury under the doctrine of *Regan v. People of New York*, 349 U.S. 58 (1955). In *Regan* an automatic immunity statute similar to Section 932.29, Florida Statutes was involved. The Petitioner, after executing a waiver of immunity under the statute, refused to testify claiming self-incrimination. He was held in contempt. The United States Supreme Court upheld the conviction, holding that the witness must testify because if the waiver was valid he had effectively waived the immunity statute, a substitute for the Fifth Amendment, and his testimony could be compelled. On the other hand, if the waiver of the state immunity statute was invalid the defendant would have immunity under the New York statute for any offense related to his testimony. The Court did not say that the testimony and the fruits thereof would be suppressed, but recognizing that the New York statute was a complete substitute for the Fifth Amendment, said it would be applicable if not properly waived and the relief provided for in the statute would be accorded and the defendant would be immunized.

II.

The Fifth Circuit Court of Appeals, while assuming arguendo that *Miranda* would apply to a Grand Jury investiga-

tion and that the failure to give the proper warnings rendered the waivers of immunity void, restricted the scope of *Miranda* to the exclusion of evidence or the fruits thereof obtained during interrogation of the petitioners. The Court held that this should be done by the trial court, in pre-trial procedures, but refused to apply the Florida immunity statute and bar further prosecution of petitioners as dictated by *Regan v. People of State of New York*, 349 U.S. 58 (1955).

This Court has stated the scope of the required immunity to be as follows:

> "In view of the constitutional provision [privilege against self-incrimination], a statutory enactment, to be valid, *must afford absolute immunity against future prosecution for the offense to which the question relates.*" *Counselman v. Hitchcock*, 142 U.S. 547, 586 (1892) (emphasis added). See also *Brown v. Walker*, 161 U.S. 591, 595 (1896).

Under this standard, the waivers of immunity being void, petitioners must be immunized against any prosecution for grand larceny.

In *Miranda*, no immunity statute was involved. Consequently, the Court suppressed the tainted admissions and confessions and reversed for new trials. Another result occurs when an immunity statute is involved and the waiver of the immunity thereunder is void. This is clearly demonstrated by *Regan v. People of State of New York*, 349 U.S. 58 (1955) and *United States v. Monia*, 317 U.S. 424 (1943).

In applying a limited scope to *Miranda* the Court of Appeals overlooked the overall purpose of the Supreme Court in *Miranda*. In his opening statement in *Miranda*, Chief Justice Warren stated that the Court was dealing with:

> ". . . the admissibility of statements obtained from an individual who is subjected to custodial police interrogation *and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth*

Amendment to the Constitution not to be compelled to incriminate himself."

Miranda v. State of Arizona
384 U.S. at 439 (1966)
(Emphasis added)

This language clearly shows the intent to protect the privilege under the Fifth Amendment and necessarily any substitute therefor such as immunity statutes. The Court even went so far as to encourage Congress and the States "to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." *Miranda v. State of Arizona*, 384 U.S. at 467.

If the failure to give the *Miranda* warnings, where an immunity statute is involved, merely results in the witness' testimony and the fruits thereof being suppressed and excluded, then no immunity statute is necessary. The same results are accomplished by the Fifth Amendment to the Constitution. The purpose of such statutes is to obtain evidence and information despite the protection afforded the witness against self-incrimination. See *Brown v. Walker*, 161 U.S. 591 (1896); *United States v. Monia*, 317 U.S. 424 (1943); *Interstate Commerce Commission v. Baird*, 194 U.S. 25 (1904); *Hale v. Henkel*, 201 U.S. 43 (1906); *McAlister v. Henkel*, 201 U.S. 90 (1906); *Smith v. United States*, 337 U.S. 137 (1949).

Although "transactional immunity" has long been thought to be constitutionally required (Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 St. Louis L.Rev. 327, 369 [1966], and has been incorporated into the legislation of most states and virtually all federal regulatory agencies (*Ullmann v. United States*, 350 U.S. 422, 438 (1956); 8 Wigmore, Evidence § 2281, n. 11 [McNaughton rev. 1961]), the Court of Appeals held in this case that "transactional immunity" was not constitutionally required as it exceeded the scope of the Fifth Amendment.

In so holding, the Court of Appeals relied solely on the dictum in *Gardner v. Broderick*, 392 U.S. 273 (1968), calling the language of *Counselman v. Hitchcock*, 142 U.S. 547 (1892) dictum.

Through the years, however, the language of *Counselman*, requiring "absolute immunity" has never been considered dictum, but the law of the case. See *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965) and *Stevens v. Marks*, 383 U.S. 234 (1966). Both *Albertson* and *Stevens*, employing the language of "absolute immunity" from *Counselman* were decided after *Malloy v. Hogan*, 378 U.S. 1 (1964) and *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964). *Murphy* and *Counselman* were relied on in *Gardner v. Broderick*, 392 U.S. 273 (1968) for its dictum that a use restriction is sufficient to meet the constitutional privilege.

In *Marchetti v. United States*, 390 U.S. 39 (1968) the defendant, asserting his privilege against self-incrimination, was convicted of conspiracy to evade the payment of the tax on wagering, and the failure to register and pay such tax. There was no immunity statute involved. The Government urged the Court to impose restrictions on the use of information obtained in compliance with the statutes similar to those imposed in *Murphy v. Waterfront Commission of New York*, 378 U.S. 52 (1964). The Court, in reversing the conviction, rejected this suggestion as inappropriate, since Congress intended that the information obtained as a consequence of registration and payment of the tax be provided to prosecuting authorities. To impose such a use restriction would directly preclude effectuation of a significant element of Congress' intent in adopting the very statute.

The Court, in *Haynes v. United States*, 390 U.S. 85 (1968), refused to impose a use restriction on the National Firearms Act for the same reasons stated in *Marchetti* and *Grosso v. United States*, 390 U.S. 62 (1968)

The difference between *Murphy* and *Marchetti* is that in *Marchetti* the Court would not by "use restriction" preclude effectuation of the statute which had as a significant purpose the obtaining of information for the purpose of prosecution. In *Murphy*, however, the Court reasoned that the state had already enacted an immunity statute, and the effect of their decision was merely to impose a use restriction on the evidence in any Federal prosecution. These considerations (in *Murphy*) obviously do not apply when dealing with immunity within a single jurisdiction. The Court of Appeal's reliance on the dictum of *Gardner* was therefore misplaced.

It is clear that the sole purpose of the Florida immunity statute is to obtain information for use in law enforcement and prosecutions. Under the cited authorities, the striking of the immunity provisions of the statute, and the imposition of use restrictions, is tantamount to rewriting the statute wherein it would not provide the absolute immunity required by *Counselman v. Hitchcock*, 142 U.S. 547 (1892). Such a construction negates the legislative intent behind the immunity statute. In *United States v. Monia*, 317 U.S. 424 (1943) this Court in enforcing the provisions of an automatic immunity statute, similar to Section 932.29, Florida Statutes, and holding that the defendants were no longer subject to prosecution because of their testimony before the Grand Jury, said:

> "Beyond dispute the appellees were entitled to immunity from prosecution if the statute is to be given effect as it is written."
>
> 317 U.S. at 426.

The Court's attention is invited to *People v. LaBello*, 301 N.Y.S. 2d 544 (N.Y. 1969) which is factually similar to this case. There the Court of Appeals of New York, in a 4 to 3 decision, ruled in a fashion similar to the Fifth Circuit Court of Appeals in this case, that is the Fifth Amendment to the Constitution did not require absolute immunity, therefore, even though the applicable immunity statute required a "transactional immunity" it and the Constitution were satisfied by a

"use" immunity. On February 27, 1970, the Supreme Court of the United States granted Certiorari in this case. See *Piccirillo v. New York*, No. 1249, 38 U.S.L. Week 3347.

Conclusion

For the above stated reasons, the petition for a writ of certiorari should be granted.

DATED: Jacksonville, Florida, June , 1970

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